I. C. C. R. 550, to the point that a carrier rate may be graduated by value. Does it also approve the opinion of Commissioner LANE in that case that such a graduation is void when it has no reference to the actual value of the goods as known by the carrier? The *Croninger* case does not necessarily involve this question, for it seems that the package was sealed and the carrier did not know its content or value. If the charges had been properly graduated, as they probably were not, then in equity as well as in law, recovery ought to be limited to the amount stated. Possibly the same may be true of the second case, the *Latta* case, in which the lower court awarded the judgment of $3024.38 for the loss of a mare and colt. The facts do not show whether the carrier's agent knew their real value, or that they were worth more than $100 each. *Latta* v. *Chicago, St. P. M. & O. R. Co.*, 172 Fed. 850, 97 C. C. A. 198. The *Miller* case, however, is not so easily disposed of. In a Nebraska court the plaintiff had recovered the full value, interest and costs, amounting to $1315.50, for the loss of a stallion shipped under a bill of lading placing a value of $100 upon the animal. On the ground that it must be governed by the federal, and not by the Nebraska or Iowa law, the case was reversed and remanded for further proceedings not inconsistent with this opinion. The court would hardly have reversed the case, if the judgment was correct, because it had been tried under the wrong law. It would seem as though it must almost be a matter of judicial knowledge that a stallion worth shipping from Iowa to Nebraska must have been worth more than $100, and that the agent of the carrier must have known that fact when the contract was made. Under that view of the situation the Supreme Court of the United States would seem to uphold the decision in *George M. Pierce Co.* v. *Wells F. & Co.*, 189 Fed. 561, commented on in 10 MICH. L. REV. 317, and in *Mering* v. *So. Pac. Co.* (Cal.) 119 Pac. 80. However we cannot be sure that the real value did appear, even in this case, or that the agent or carrier saw the animal that was shipped, and therefore this case hardly, even by necessary implication, decides the question of whether a contract limiting the value for the purpose of shipment to an amount known to the agent of the carrier to be much less than the real value, will be upheld by the court. If the *Pierce* case should be approved, then it seems probable Congress will again be called upon by further statutes to protect the shipper from the powerful carrier, with whom he deals upon such unequal footing that it strains the meaning of words to say that there is any real contract between them. See the very recent cases in a Colorado Court of Appeals, *Col. & S. Ry. Co.* v. *Manatt*, 121 Pac. 1012, following *U. P. R. Co.* v. *Stupeck* (Colo.), 114 Pac. 646; in Tennessee, Senator CARMACK'S home state, *Drake* v. *Nashville C. & St. L. R. Co.*, 148 S. W. 214; and in Texas where the *Hart* rule is denied *in toto*, *Galveston H. & S. A. R. Co.* v. *Critten*, (Texas Civ. App.), 147 S. W. 361. Further decisions on this question will be awaited with interest. E. C. G.

WAIVER BY THE DEFENDANT OF HIS RIGHT TO BE PRESENT AT HIS TRIAL.—In these times when so much adverse criticism is being directed against the courts and their methods of procedure, the attention of lawyer and law-

student alike is especially attracted by cases in which it appears that substantial justice has been sacrificed to technicality. A recent case—*State* v. *Sutter* (W. Va. 1912) 76 S. E. 811,—seems to be of this type. In that case the defendant was convicted of keeping cocaine in his possession with intent to sell the same. A statute of the state provided that a person indicted for felony "shall be personally present" during the trial therefor. After the state had closed its evidence, the judge and attorneys went to a room other than the court room and there a motion to strike out the evidence of one of the state's witnesses was made, argued, and decided against the defendant. After the motion had been heard it was discovered that the defendant was not present, and the judge had him brought in and stated to him and his counsel that he would again hear the motion argued; but the prisoner's counsel, in his presence, declined to accept the offer. The court considered that the following words were sufficient to dispose of the case: "Following many former decisions, it is not necessary to rediscuss this subject. We feel bound by them to reverse the judgment and grant a new trial."

Three former West Virginia cases were cited: *State* v. *Parsons,* 39 W. Va. 464, 19 S. E. 876; *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 676; *State* v. *Detwiler,* 60 W. Va. 583, 55 S. E. 654. In *State* v. *Sheppard,* the court, in speaking of the defendant's right to be present at his trial, used the following language, "To be present during every part of the trial was a constitutional right which he could not waive. Until this time, this court has not only held that the right could not be waived but also that such an error could not be cured." This case, it should be noted, was a prosecution for a capital crime. *State* v. *Detwiler,* though a non-capital case, follows *State* v. *Sheppard* without further discussion of the principles involved. In the other case cited, *State* v. *Parsons,* the question of waiver was not presented.

It would seem that the court was too ready to apply the doctrine of *stare decisis* in the principal case, and that a reconsideration of the question would have been beneficial. WILLIAMS, J., dissenting, took the position that the question was worthy of reconsideration, and it was his opinion that the defendant could waive his right to be present at such a trial as this, and that he did in fact waive it. There can be little doubt that what was done amounted to a waiver, if in law it were possible for the defendant to waive the right. It is true that in some cases it has been held that this right cannot be waived by an attorney, but must be waived by the defendant personally. *Sherrod* v. *State,* 93 Miss. 774, 47 So. 554; *Green* v. *Peo.,* 3 Colo. 68. It is evident that this principle is not applicable to the facts in the present case, where the waiver was made in the presence of the defendant and under such circumstances that it must be considered as his own act. A more difficult question is the one as to whether a defendant who is being tried for a felony not capital can waive his right to be present at the trial. It is submitted that the view of the dissenting justice to the effect that this right may be waived is correct.

This question has arisen a surprisingly large number of times, and is the source of much contrariety of opinion and conflict of authority in the decisions. The general state of the authorities seems to be well expressed in 12

CYC. 527, as follows: "Some of the courts have held that the right to be present during the trial of an indictment for felony cannot be waived by defendant in a capital case, and some have applied the same rule in the case of any felony, whether capital or not. Most of the courts, however, have held that the defendant may waive his right to be present when the felony is not capital." The distinction between capital felonies and those not capital, though evidently not recognized in West Virginia, was early made and has been consistently adhered to by most courts. The reason for this distinction is thus stated in a recent case, *Starr* v. *State* (Okla. 1911), 115 Pac. 356; "Generally speaking, the constitutional provisions guaranteeing to every accused person in a criminal action certain rights, may be separated into two classes. First, those in which the public generally, and as a community, is interested, as well as the accused, and which are jurisdictional as affecting the power of the court to try the cause; second, those more in the nature of privileges which are for the benefit of the accused alone, and do not affect the general public. The former cannot be waived. Jurisdiction to try the cause is conferred by law. Consent cannot confer jurisdiction, but the accused may waive a constitutional right or privilege designed for his protection, where no question of public policy is involved." *State* v. *Vanella,* 40 Mont. 326, 106 Pac. 364, is to the same effect. The United States Supreme Court treats the question as follows: "Where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." *Diaz v.* U. S., 223 U. S. 442. Among other cases recognizing the basic distinction between capital crimes and those not capital are: *Whitehead* v. *State,* (Tex. 1912) 147 S. W. 583; *State* v. *Cherry,* 154 N. C. 624, 70 S. E. 294; *Sherrod* v. *State,* 93 Miss. 774, 47 So. 554; *State* v. *Kelly,* 97 N. C. 404, 2 S. E. 185. The practical result of allowing a defendant to break up a trial by a temporary withdrawal from the court-room is set forth in *Falk* v. *U. S.,* 15 App. D. C. 446.

Another point seems worthy of notice. In the principal case the proceedings in the absence of the defendant consisted of the hearing of a motion to strike out evidence. One reason often given for the rule that a defendant must be present when witnesses are being examined is that the defendant has the right to "observe every look, gesture, or movement of the witness while he was testifying." *State* v. *Greer,* 22 W. Va. 800. The reason for the rule loses much of its force when applied to the defendant's presence at the hearing of a motion to strike out evidence. If a motion "relates to a mere matter of law, or if in any other form a question simply of law is agitated, the better doctrine both in reason and authority is that he (the defendant) may be absent at the trial." 1 BISHOP NEW CRIMINAL PROCEDURE, § 269. A motion to strike out evidence involves questions of law, and there can be but little possibility of prejudice to the defendant on account of his absence during the arguing of such a motion. Clients must, in

the nature of things, place some reliance in the integrity of their counsel, and of the courts. The universal practice of trial courts in hearing the whispered arguments of counsel as to the relevancy of testimony is pointed out in the dissenting opinion. It is difficult to see any substantial difference between that proceeding, and the proceeding complained of in the principal case.

With all due consideration for personal rights and liberties, the courts should remember that even criminal cases have two sides. A rule of law which requires the court to send a case back for a new trial, with its attendant expense and delay, when it is perfectly evident that in the first trial there was nothing which could possibly have prejudiced the defendant, seems to be worthy of some consideration whenever it is presented, and if the courts are to meet the emphatic demands of the present age they should not hesitate to overturn technical rules of procedure which clearly prevent the proper administration of the law, and which have nothing to recommend them, except the fact that they appear to be "established." J. M. H.

MAY A DEFAULT DECREE BE GIVEN GRANTING RELIEF WITHOUT REDUCING THE EVIDENCE TO WRITING.—It has been said that an affirmance by an equally divided appellate court is really no affirmance at all, as it merely leaves undisturbed the findings of the court below. The question involved, however, when so presented, is always bound to be one of great interest and therefore to warrant some discussion concerning the matters involved. In *Duncan* v. *Duncan,* (So. Car., 1913), 76 S. E. 1099, a suit was brought by a wife to compel her husband to account to her for the rents of her real estate collected by him, and to enjoin him from interfering with her property. The defendant interposed two separate frivolous defenses which were stricken out. Thereupon judgment was rendered for the plaintiff by default, and damages were granted to the plaintiff in the sum of $1051, upon testimony which was not reduced to writing. The defendant moves the higher court for a new trial on the ground that the findings were against the weight of the evidence. In favor of affirmance, it was held by HYDRICK, J. and WOODS, J., that a default decree granting relief could be entered without reducing to writing the testimony to support it. WATTS, J. and FRAZER, J. dissented, and GARY, C. J. was disqualified.

In support of the opinion in favor of affirmance on this point, no cases are cited, and the dissenting opinion is equally barren in that regard. A search through the authorities has also further failed to disclose any case directly in point. The opinion in favor of affirmance proceeds on the broad general ground that a court of appeal will indulge every presumption of fact in favor of sustaining the court below. This presumption prevails "if there is any substantial legal evidence upon which it may be seen that the findings of fact in question, aided by every reasonable inference, could, with reason, have been based; unless it also appears that the court below failed to duly consider proper evidence which was not admitted, or was unduly influenced by the admission of improper evidence", 3 CYC. 308, and cases cited; *Turner*